APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 680—August Term, 1981

(Argued March 3' 1982 Decided June 11, 1982)

Docket No. 81-4153

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—against—

GAIU LOCAL 13-B, GRAPHIC ARTS INTERNATIONAL UNION,

Respondent.

Before:

.EINBERG, *Chief Judge,*
MANSFIELD, *Circuit Judge,*
MISHLER, *District Judge.**

* Of the United States District Court for the Eastern District of New York, sitting by designation.

Petition for enforcement of an order of the National Labor Relations Board, 252 N.L.R.B. 936 (1980), directing the respondent Union to rescind its disciplinary action against 17 of its members for resisting its ban against their performing overtime work for their employer and to compensate them for losses suffered by reason of the ban. The Board found that the ban was an unfair labor practice in violation of § 8(b)(1)(A) of the National Labor Relations Act and was not adopted in response to alleged unfair labor practices on the part of the employer.

Enforcement granted.

RUAH D. LAHEY, Attorney, National Labor Relations Board, Washington, DC (William A. Lubbers, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, National Labor Relations Board, Washington, DC, of counsel), *for Petitioner.*

RALPH P. KATZ, Esq., New York, NY (Delson & Gordon, New York, NY, of counsel), *for Respondent.*

MANSFIELD, *Circuit Judge:*

The National Labor Relations Board (the "Board") petitions pursuant to § 10(e) of the National Labor Rela-

tions Act (the "Act"), as amended, 29 U.S.C. §§ 151, *et seq.*, for enforcement of an order issued by it on September 20, 1980, against GAIU Local 13-B, Graphic Arts International Union (the "Union"), directing it to rescind its disciplinary action against 17 of its members because of their resistance to a Union ban against performing overtime work for the Western Publishing Co. (the "Employer"). The order also requires the Union to nullify its overtime ban, to compensate the disciplined members for losses suffered as a result of the ban, and to post appropriate notices. We enforce the Board's order.

The Union represents employees at the Employer's Poughkeepsie plant, which publishes books and similar materials, employing some 500 persons engaged in production and related activities, driving of in-plant equipment and janitorial services. Following the expiration on May 16, 1978, of the contract between the Employer and the Union the parties negotiated while the employees continued working without a contract. Under the terms of their employment the employees were obligated to perform paid overtime work when assigned by the Employer.

On July 14, 1978, the Employer advised 13 employees that they would be suspended for one day each because of their refusal to perform assigned mandatory overtime work but postponed putting the suspensions into effect. On August 28, 1978, the Union held a membership meeting at which 320 out of a total of 490 Union members were present. The members voted 220 for and 100 against adopting a work rule, effective at once, prohibiting members from performing mandatory overtime work. On August 30, 1978, the Employer responded by discontinuing overtime work. However, in October it reinstituted overtime to meet customers' needs, first ad-

vising employees that it did not intend to discipline employees who refused to work overtime but then returning to a mandatory overtime policy. Thereafter at least 17 employees who were Union members worked overtime in violation of the Union rule banning overtime.

On October 25, the Union began disciplining each of the 17 members through internal union charges, fines and lawsuits. A $50 fine was imposed on each of these employees for each day worked overtime. Also on October 25 the Union filed with the Board a complaint alleging that the Employer had committed unfair labor practices by failing to bargain with it in good faith and by improperly communicating directly with the employees.

On December 6, 1978, a unit employee who had been fined by the Union for violating its overtime ban filed a complaint with the Board against the Union charging that the ban was an unfair labor practice. On December 7, 1978, the Employer informed the Union that because of the bargaining impasse it would on December 11 put into effect the terms of its final contract offer but would not change the work hours to 37 1/2 hours per week, "[d]ue to [the Union's] continued threat of fines and discipline against employees who work in excess of 36 1/4 hours." On December 18, 1978, the Union filed a second unfair labor practice charge against the Employer, adding that it had unlawfully made unilateral changes in work conditions without a valid bargaining impasse. This was followed by a Union notice to its members on January 3, 1979, lifting the overtime ban but advising that if the Employer changed the existing 36 1/4-hour work week the ban would be reinstated immediately. The Employer then notified employees that it planned to put its proposed 37 1/2-hour work week into effect when the Union ended its threats of fines and discipline. After an un-

successful bargaining session on January 16, 1979, the Employer advised that it intended to implement the 37 1/2-hour work week on January 22, 1979, whereupon the Union advised that the ban was "back on."

The unfair labor practice charges filed by the Union against the Employer were settled by an agreement, approved by the Regional Director, between the Board's General Counsel and the Employer, in which the Union did not participate. The charges against the Union were heard by an Administrative Law Judge ("ALJ"), who found the Union's ban against overtime to be a lawful self-help response to the Employer's unfair labor practices allegedly committed during collective bargaining. Since the charges against the Employer had been settled the ALJ declined to hear evidence as to its commission of unfair labor practices. He did, however, admit testimony of the Union's recording secretary as to what was said at the meeting at which the ban was adopted but excluded various exhibits offered by the Union to prove that the Employer had engaged in unfair labor practices. Aside from the evidence of what transpired at the meeting the Union did not offer proof to show its reasons for adopting the ban.

A three-member Board panel reversed the ALJ's decision, holding that the ban had not been adopted in response to any unfair labor practices but "solely as a bargaining tactic, designed to put economic pressure on Western [Employer] and to force Western to make bargaining concessions. . . .", 252 N.L.R.B. 936, 938. It based its finding on a record showing that the Union had filed

> "no charges . . . against Western until almost 2 months after the overtime ban was implemented,

> that there is no evidence of any discussion at the August 28 union meeting characterizing Western's actions as unfair labor practices, that [the Union's] notice announcing the overtime ban makes no reference to Western's alleged unfair labor practices, and that the meager evidence as to the discussion at the August 28 union meeting indicates the employees were mainly concerned with Western's failure to reach an agreement with the Union quickly." *Id.*

The Board then concluded that the Union's disciplining of members who engaged in unprotected activity (i.e., refusal to perform mandatory overtime, for which they might lawfully be subjected to suspension or discharge by the Employer) violated "an overriding policy of the labor laws," *Scofield v. NLRB*, 394 U.S. 423, 429 (1969), and therefore constituted an unfair labor practice under § 8(b)(1)(A) of the Act. The Board order, which is the subject of the present petition, followed.

DISCUSSION

Section 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A), makes it an unfair labor practice for a union to "restrain or coerce" employee-members in the exercise of their rights under § 7, 29 U.S.C. § 157, which include the right to engage in or refrain from concerted activities, but § 8(b)(1)(A) preserves to the union the right "to prescribe its own rules with respect to the acquisition or retention of membership therein." However, the latter proviso does not permit a union to adopt rules which are not in furtherance of a legitimate union interest or which are counter to an overriding policy of the labor laws, *Scofield v. NLRB*, 394 U.S. 423, 429, 430 (1969); *NLRB*

v. Industrial Union of Marine & Shipbuilding Workers of America, 391 U.S. 418, 424 (1968), such as finding a member for filing a charge with the Board, *NLRB v. Industrial Union of Marine & Shipbuilding Workers of America, supra*, 391 U.S. at 424, or for refusing to take part in conduct that violates the Act or the collective bargaining agreement, *Local 1104, Communications Workers of America v. NLRB*, 520 F.2d 411, 415 (2d Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976); *NLRB v. Communications Workers Local 1170*, 474 F.2d 778, 782 (2d Cir. 1972); *Stationary Engineers, Local 39, International Union of Operating Engineers*, 240 N.L.R.B. 1122, 1123 (1979). The "policy of the Act is to insulate employees' jobs from their organizational rights," *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954).

In resolving the tension between a union's organizational rights and its members' exercise of rights guaranteed by § 7, the law allows a union to take disciplinary action against a member for refusing to engage in protected activity that will not jeopardize his job, see, e.g., *Scofield v. NLRB, supra* (adoption of piece work limits which would not entitle employer to discriminate against members obeying them), but does not allow it to do so because of a member's refusal to engage in conduct that is unlawful under the Act or that violates the collective bargaining agreement. *Local 1104, Communication Workers of America, supra; Stationary Engineers, Local 39, supra.* The issue before us here, however, is whether the Union may go further and punish a member for engaging in unprotected activity that violates neither the Act nor the collective bargaining agreement, in this case refusing to perform mandatory overtime work, which would jeopardize a member's job by entitling the Employer to terminate his employment and refuse to reinstate him.

Putting aside the prohibition of a no-strike clause, not involved here, a union may properly adopt rules disciplining members who refuse to engage in a full economic strike in which they do no work for the employer. *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967). Such strike activity is lawful and protected from being used as the grounds for punishment of striking employees by the employer, who must look elsewhere for substitutes and cannot deny the employees reinstatement upon termination of the strike, in absence of good cause. An employee who chooses to continue working but refuses to obey his employer's orders to perform activities forming a legitimate part of his work is not so protected. He is obligated to perform all of the work he was hired to do. To permit an employee in such a fashion unilaterally to dictate the terms and conditions of his employment could lead to chaos. An employer is entitled to receive from a person who opts for continued employment the full and undiluted performance of the duties for which he is hired and paid. The employee cannot have it both ways, i.e., continue to be employed but insist on working part-time as an economic weapon, any more than the employer would be permitted unilaterally to pay an employee less than the agreed upon wages for his services. See *Excavation-Construction, Inc. v. NLRB*, 660 F.2d 1015, 1020-22 (4th Cir. 1981); *Liberty Mutual Insurance Co. v. NLRB*, 592 F.2d 595, 604-06 (1st Cir. 1979); *Shelly & Anderson Furniture Manufacturing Co., Inc. v. NLRB*, 497 F.2d 1200, 1202-03 (9th Cir. 1974).[1] Applying

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[1] There is one exception to the rule:

"The statutory protective shield extends to a *single* refusal to work overtime if it is a concerted activity directed at changing working conditions or employer policy." *NLRB v. Gulf-Wandes Corp.*, 595 F.2d 1074, 1078 (5th Cir. 1979) (emphasis added); *see NLRB v. A.*

this rule, courts have uniformly held that a concerted refusal to perform overtime is an unprotected partial work stoppage. See, e.g., *Excavation-Construction, Inc. v. NLRB, supra,* 660 F.2d at 1020-22; *First National Bank of Omaha v. NLRB,* 413 F.2d 921, 925 (8th Cir. 1969); *C.G. Conn, Ltd. v. NLRB,* 108 F.2d 390, 397-98 (7th Cir. 1939).

A union rule requiring an employee to engage in such unprotected activity, even though adopted by a majority of the union's members, amounts to an unlawful restraint or coercion on its employee-members. It forces them, it they wish to continue working, to engage in unlawful activity and to risk being lawfully discharged by their employer or subjected to lawful imposition of disciplinary measures. An employee who engages in lawful strike activity retains his accrued rights, § 2(3) of the Act, 29 U.S.C. § 152(3), and is entitled to reinstatement upon conclusion of the strike unless the employer shows legitimate reasons to the contrary, *NLRB v. Fleetwood Trailer Co.,* 389 U.S. 375, 378 (1967); *H. & F. Binch Co. Plant v. NLRB,* 456 F.2d 357, 364-65 (2d Cir. 1972); *The Laidlaw Corporation v. NLRB,* 414 F.2d 99, 105 (7th Cir. 1969), *cert. denied,* 397 U.S. 920 (1970). However, an employee discharged for misconduct in violation of the terms of his employment may be denied reinstatement, *Liberty Mutual Insurance Co. v. NLRB, supra,* 592 F.2d at 605-06; *NLRB v. John S. Swift Co.,* 277 F.2d 641, 646 (7th Cir. 1960). For these reasons, this type of economic coercion on the part of a union, forcing members to engage in

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Lasaponara & Sons, Inc., 541 F.2d 992, 997-99 (2d Cir. 1976), *cert. denied,* 430 U.S. 914 (1977).

Since the Union's overtime ban was not a "one day" event, this exception does not apply.

unprotected activity, is impermissible since it jeopardizes the members' employment relationships, imperils their livelihood, and impairs our national labor policy. *Insurance Workers International Union,* 236 N.L.R.B. 440 (1978), see *Scofield v. NLRB, supra,* 394 U.S. at 428; *NLRB v. Boering Co.,* 412 U.S. 67, 73 (1973). Nor may such a union role be saved on the ground that the employee who wishes to avoid unprotected activity may leave the union and escape the rule. A rule which is inconsistent with our national labor policy must give way.

None of the Supreme Court decisions relied on by the Union supports its contentions that it may fine or discipline a member for refusal to engage in unprotected activity. In *NLRB v. Insurance Agents' International Union,* 361 U.S. 477 (1960), the Court merely held that unprotected union activity used as a form of economic pressure (e.g., work stoppages, " 'slow-down,' 'sit-in,' and arguably unprotected disloyal tactics," for which "the employer could have discharged or taken other appropriate disciplinary action against the employees," *id.* at 493-94) did not constitute a refusal to bargain in good faith in violation of § 8(b)(3) of the Act. The Court was not called upon to rule whether the union's disciplining of a member for not joining in such unprotected activity would violate § 8(b)(1)(A) of the Act, which is the issue here. In *Scofield, supra,* the piece-work ceiling could not have any adverse effect on the employment relationships of the employees with their employer, see 394 U.S. at 432-33; here the overtime ban would jeopardize their jobs. In *Lodge No. 76, International Association of Machinists v. Wisconsin Employment Relations Commission,* 427 U.S. 132 (1976), the Court did not hold that the Act permits union disciplining of members for refusal to obey a union ban on overtime; it simply held

that regulation of the use of an overtime ban as an economic weapon was activity preempted to the Board under the Act and free of regulation by the states. Indeed, the Court then took pains to point out that it was not ruling on the question of whether the overtime ban there was "protected" under § 7, but confirmed that the employer would in any event have countervailing economic weapons available, including "discharg[ing] or tak[ing] other appropriate disciplinary action against the employees participating," *id.*, 427 U.S. at 152-53 & n.14. In *NLRB v. Boeing Co., supra,* 412 U.S. 67, the Court, in holding that the Board had no authority under the Act to rule on the reasonableness of union fines "not affecting the employer-employee relationship and not otherwise prohibited by the Act," *id.* at 73, reaffirmed the holding of *Scofield* that "the Board would have authority to pass on those rules affecting an individual's employment status but not on his union membership status," *id.* at 73-74.

Applying the foregoing principles here, it is clear that, unless justified as a defense to unlawful activity on the Employer's part, the Union's overtime ban violated § 8(b)(1)(A) of the Act. In the present case overtime, being mandatory and lawfully required, was an integral part of the employees' assigned duties and could not lawfully be rejected by them. The Union's rule banning overtime therefore jeopardized their employment relationship, since it would entitle the Employer to terminate them without reinstatement or take other disciplinary action against them.

The Union next contends that even if the ban would ordinarily be unlawful it was legally justified in this case as a response to general unfair labor practices allegedly committed by the Employer during the course of its collective bargaining with the Union. The Union relies on

Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956), which upheld employees' right to strike in response to their employer's unfair labor practice. The Board replies that *Mastro Plastics*, which involved "total" (and hence protected) strike activity on the part of employees, should not govern the present case, which grows out of unprotected "partial" strike activity not aimed at an employer's attempt to impose unlawful working conditions. We find it unnecessary to resolve this issue since the Board here made a finding, supported by substantial evidence, that the overtime ban was not adopted in response to the Employer's alleged unfair labor practices but solely as an economic weapon to improve the Union's bargaining position in on-going negotiations.

The Union's August 28, 1978 notice announcing the overtime ban made no mention of any conduct on the Employer's part that might amount to an unfair labor practice. Nor was there any evidence of discussion at the Union meeting on that date of any such unfair labor practice on the part of the Employer. In requiring that the employees work their agreed-upon mandatory overtime, the Employer was not attempting thereby unilaterally to impose a change in terms of employment over the protest of the Union or its members. The evidence, on the contrary, indicated that the members approved the ban because of dissatisfaction with the Employer's failure to reach an agreement promptly with the Union rather than because the Employer was doing anything unlawful.[2]

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[2] The Union points to the following answer of its recording secretary, Phyllis Goodall, given in the course of her testimony before the ALJ, as evidence that it acted in retaliation for unfair labor practices on the part of the Employer:

"Q Can you tell us, at that meeting, what was said by certain members when they spoke on it [the ban]? Either for or against,

Moreover, the Union failed for almost two months after the August 28, 1978, meeting to file any unfair labor practices against the Employer, which supports the Board's inference that the August 28 ban represented a bargaining weapon. Otherwise the charges would have been filed immediately.

After the Board applied for enforcement of its order the Union filed with us in this proceeding a motion that the case be remanded to the Board for the taking of additional evidence which would allegedly support its defense that it promulgated the overtime ban in response to the Employer's alleged unfair labor practice. This relief, which the Board opposes, is sought on the ground that the ALJ, by erroneously precluding subjective evidence of the Union's purpose and excluding certain minutes of Union meetings and Union-Employer bargaining sessions, prevented or dissuaded it from proving the Employer's unfair labor practices and that Union members were motivated thereby to adopt the ban.

At the hearing on the Board's charges the ALJ initially ruled that the Union's intent in adopting the ban and disciplining its members for violation thereof was irrelevant. However, after the Board's General Counsel made out a prima facie case through documentary proof of the Union's adoption and implementation of the ban, the ALJ permitted the Union to introduce through Ms.

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and if you can remember specific names of people who spoke? And if you can't, tell me you can't.

"A No, all I do remember is that they gave the same argument all the time in speaking about why we were working the company's overtime when they're, you know, were doing different things to the members. This was brought up continuously on the floor and at work."

However, this vague answer is hardly sufficient to call for rejection of the Board's findings made on the basis of other evidence.

Goodall, its recording secretary, testimony and exhibits showing what occurred at the August 28th special meeting of the Union at which the ban was adopted. The ALJ, advised of the Union's defense, indicated that he was aware of the unfair labor practices against the Employer, which had been settled, that he did not want a collateral trial of those charges, that he would admit objective evidence of facts with respect to the Union's defense, and that he would exclude a witness' "opinion and conclusions." The ALJ, although admitting the foregoing testimony and minutes of the August 28th meeting, excluded other documents claimed by the Union to show unfair labor practices by the Employer, including minutes of bargaining sessions and communications by the Employer to employees regarding bargaining proposals and the status of negotiations.

After introducing Ms. Goodall's testimony the Union rested without making any offer of the proof (other than the rejected minutes) which it wished to introduce to show motivation or unfair labor practices. Nor did the Union, upon the General Counsel's appeal to the Board, file any cross-exceptions to the ALJ's rulings, seek to reopen the record, or even contend that it would have offered any additional evidence other than that rejected by the ALJ even though the General Counsel contested the ALJ's finding that the ban was adopted as a response to employer unfair labor practices.

On the record before it the Board, in reversing the ALJ's finding that the ban was a permissible response to unfair labor practices, stated that under that theory a union must prove that unfair labor practices occurred, and therefore the ALJ had erred in not permitting the Union to litigate the alleged unfair labor practices by the Employer. However, it found that proof of the Em-

ployer's unfair labor practices would not have made any difference because the Union's ban had not been adopted in response thereto but "solely as a bargaining tactic." 252 N.L.R.B. at 938. Following the Board's decision, the Union did not seek leave to present additional evidence on the issues of motivation or unfair labor practices. Nor did it at any point indicate dissatisfaction with the ALJ's evidentiary rulings and exclusion of the minutes and letters offered by the Union. Indeed, the first time the Union sought to reopen the record to take additional evidence was on this appeal.

Section 10(e) of the Act, 29 U.S.C. § 160(e), provides that no objection not urged before the Board shall be considered by the court except where the failure to urge it is excused because of extraordinary circumstances. It further provides that the Board's findings when supported by substantial evidence shall be conclusive and that the court may on motion reopen the record to take additional material evidence upon a showing that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Board.[3] See *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 311-12 & n.10 (1979); *NLRB v. Ochoa Fertilizer Corp.*, 368 U.S. 318 (1961);

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3 Section 10(e) provides in pertinent part:

"No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record."

NLRB v. Cheney California Lumber Co., 327 U.S. 385 (1946). The purpose of this provision is to insure against piecemeal appeals to the court by requiring the parties first to give the Board an opportunity to rule upon all material issues in a case. The Board has implemented this statutory policy by adopting regulations requiring the parties to raise by exceptions or cross-exceptions all issues they desire the Board to consider in reviewing an ALJ's decision. These regulations specifically provide that any exception "not specifically urged shall be deemed to have been waived," Board Rules and Regulations, Series 8, as amended, 29 C.F.R. § 102.46(b) and (h). In the present case the Union not only failed, upon being apprised of the ALJ's adverse rulings, to make a specific offer of proof (except as to the rejected minutes and letters), but failed to file any cross-exceptions with the Board after receiving the General Counsel's exceptions.

The Union argues that since it had prevailed before the ALJ it should be excused for not having filed timely cross-exceptions with the Board. This contention must be rejected, however, for the reason that the Union was put on notice of the possible importance of its evidence of motive and unfair labor practices by the General Counsel's exceptions taken to the ALJ's holdings that were favorable to the Union. Moreover, the Union could still have raised the evidentiary issues after learning of the Board's adverse decision by moving for reconsideration, rehearing or reopening of the record as it was permitted to do under § 10(d) of the Act and regulations promulgated thereunder, 29 C.F.R. § 102.48(d).[4] Having failed to

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[4] Section 10(d) provides:

"(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set

bring the evidentiary errors "to the Board's attention through a petition for rehearing, it cannot assert [them] here on appeal," *Glaziers' Local No. 558 v. NLRB*, 408 F.2d 197, 203 (D.C. Cir. 1969). "Simple fairness . . . requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952).

Nor are we persuaded by the Union's argument that a motion before the Board for reconsideration or introduction of additional evidence would have been futile because most such motions are usually denied by the Board. It would be surprising to find that motions for reconsideration or reopening were not usually denied since in most cases the proferred evidence is not newly discovered but is immaterial or cumulative evidence that would not change the Board's decision. We cannot, however, accept the Union's contention that if it had, upon a motion to

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aside, in whole or in part, any finding or order made or issued by it."

29 C.F.R. § 102.48(d)(1) provides:

"(d)(1) A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing de novo and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing."

the Board based on specific evidence showing that the result would be changed, the Board would have denied the motion. To accept this contention would be to assume that the Board's procedures for reconsideration are meaningless. This we cannot do. Here the Union at no time offered specific evidence on the issues of motivation other than the minutes and letters excluded by the ALJ. Our review of these documents merely reveals that the parties were locked in hard bargaining and that the ban, rather than constituting a reaction to unfair labor practices on the Employer's part, was adopted by the Union as an affirmative bargaining weapon. Lastly, to remand this case, which is now more than 3 1/2 years old, to the Board for further proceedings would only promote interminable delay without appreciable likelihood of any change in the result. There comes a time when further litigation of a case must stop and it has been reached here.

Accordingly the petition for enforcement of the Board's order is granted and the motion to remand the proceedings is denied.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 81-4153

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of June one thousand nine hundred and eighty-two

Present:

[Filed Jun 11 1982
A. Daniel Fusaro, Clerk]

HON. WILFRED FEINBERG, Ch.J.
HON. WALTER R. MANSFIELD, Circuit Judge
HON. JACOB MISHLER, District Judge

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

GAIU LOCAL 13-B, GRAPHIC ARTS INTERNATIONAL UNION,

Respondent.

A application for an enforcement of an order of the National Labor Relations Board.

This cause came to be heard on a certified list of items comprising the record of the National Labor Relations Board and was argued by counsel,

UPON CONSIDERATION THEREOF, it is hereby ordered, adjudged and decreed that the application for enforcement of said order be and it hereby is granted in accordance with the opinion of this court with costs to be taxed against the respondent.

IT IS FURTHER ORDERED that the respondents' motion to remand the proceedings to the National Labor Relations Board be and it hereby is DENIED.

A. Daniel Fusaro, Clerk

EDWARD J. GUARDARO
by Edward J. Guardaro,
Deputy Clerk

APPENDIX C

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 3—CB—3304

GAIU LOCAL 13-B, GRAPHIC ARTS INTERNATIONAL UNION
(Western Publishing Co., Inc.)

and

ROBERT GREENE, an Individual

DECISION AND ORDER

On February 19, 1980, Administrative Law Judge George Norman issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief in opposition to the exceptions of the General Counsel.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge concluded that Respondent did not restrain and coerce employees in violation of Section 8(b)(1)(A) of the Act by instituting a ban prohibiting its members from performing mandatory overtime work and by attempting to enforce this ban through internal union charges, fines, and lawsuits. The Administrative Law Judge found that,

although the refusal of Respondent's members to work any mandatory overtime would normally be considered unprotected as a recurring or intermittent partial strike, such activity was protected in the circumstances of this case because it was in response to the Employer's alleged unfair labor practices. The Administrative Law Judge concluded that the members who complied with Respondent's overtime ban could not lawfully be disciplined by their Employer for engaging in such protected activity and that therefore Respondent had not restrained or coerced employees by disciplining its members who had worked overtime in violation of the ban. Contrary to the Administrative Law Judge and for the reasons set forth below, we find that the refusal of Respondent's members to work mandatory overtime was, in the circumstances of this case, an unprotected partial strike despite the alleged unfair labor practices of the Employer, and thus Respondent violated Section 8(b)(1)(A) of the Act by enforcing its overtime ban.

Background and Facts

Western Publishing Co., Inc.,[1] is engaged in the publishing of books and related items at its various facilities in Missouri, New York, and Wisconsin. The only facility involved in this case is Western's Poughkeepsie, New York, plant, where Respondent has represented the janitors, the inplant material handling equipment drivers, and the production and service employees in the baling operation and in the Binderies, Receiving, Shipping, Sheeting, and Paper Handling Departments since about 1952.

The following facts were stipulated by the parties at the hearing. The most recent collective-bargaining agreement between Western and Respondent expired on May 16, 1978.[2] Negotiations for a new contract began on April 7. About 40 bargaining sessions had been held by the time of the hearing on September 28, 1979, but no new agreement had been reached.

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1 Herein called Western.

2 All dates herein are in 1978, unless otherwise indicated.

On July 14, Western gave 1-day suspensions to 15 employees because of their repeated refusals to perform mandatory overtime work.[3] On August 28, Respondent announced new "Work Rules" which stated:

1. No overtime shall be worked by any member of Local 13-B Poughkeepsie G.A.I.U.

2. Established shift and starting times in effect August 28, 1978 shall not be changed.

3. Failure to comply with these rules and any disciplinary action and/or discharge of any member of Local 13-B for the observance of these work rules shall be considered an action taken against all of the members and will be treated by the Local as a lock out.

By a letter dated August 30, Western notified its employees that, "Effective immediately, all overtime is discontinued. This action was taken in your best interests since it was reported to us that employees were being threatened with fines should they work any overtime."[4]

By a letter dated October 17, Western notified its employees that it intended to begin scheduling overtime again that weekend because of the needs of one of its largest customers; that although it had a legal right to discipline employees who refused to work overtime, it did not intend to do so; but that it did intend to accomplish the overtime work with nonunit employees if necessary. On October 21 Western reinstated its mandatory overtime policy, and after that time at least 17 unit

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3 The suspensions are being held in abeyance by Western pending the resolution of this case.

4 The complaint in this case originally alleged that before August 28 the practice at the Poughkeepsie plant was that individual employees decided voluntarily whether or not to work overtime; however, it appears that this allegation has been dropped, since the factual stipulation entered into by the parties at the hearing refers consistently to Western's overtime policy as "compulsory assigned paid overtime" and as "mandatory overtime" and since no evidence was presented to indicate that acceptance of overtime assignments was ever voluntary.

employees who were members of Respondent performed mandatory paid overtime work as assigned.

On October 25, Respondent began taking steps to discipline these 17 members through internal union charges, fines, and lawsuits in state court, because they had violated the overtime ban.[5] On October 25, Respondent also filed an unfair labor practice charge against Western alleging that since April 1978 Western had failed to bargain in good faith with Respondent by dealing directly with its employees, by attempting to bypass Respondent as the bargaining representative of its employees, and by entering negotiations with a fixed position which it would not change during the course of bargaining.

By a letter dated December 7, Western notified Respondent that, because negotiations had reached an impasse, effective December 11 Western would implement its final contract offer, but that "Due to your continued threat of fines and discipline against employees who work in excess of 36-1/4 hours, the Company is not implementing the change to 37-1/2 hours per week at this time." On December 18, Respondent filed another unfair labor practice charge against Western alleging that Western had refused to meet and bargain with Respondent since early October 1978 and had unilaterally implemented its last offer on December 11 without a valid impasse in bargaining.[6]

On January 3, 1979, Respondent issued a notice to its members stating:

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5 The documents included in the parties' stipulation indicate that the members involved were assessed a penalty of 1 day's pay plus a $50 fine for each day of overtime worked, plus attorneys' fees for the state court action to collect the fines.

6 The record reveals that a complaint was issued against Western on all of the above 8(a)(5) allegations and that the complaint against Western was consolidated for hearing with the complaint in this case. However, on September 26, 1979, the complaint against Western was severed from this case based upon a settlement agreement between Western and the General Counsel. The settlement agreement was approved unilaterally by the Regional Director for Region 3 despite Respondent's failure to enter into the settlement as the Charging Party.

As of January 3, 1979, the work rules and overtime ban implemented Agusut 28, 1978, will be lifted.

However, should the Company make any change in the 36-1/4 hours work week these rules will be re-implemented immediately.

The Negotiating Committee
/s/ Tony Sosta.

By a letter dated January 5, 1979, Western notified its employees and Respondent that the Union's notice of January 3, 1979, reflected no real change in the Union's position, that Western still intended to implement the 37-1/2-hour workweek as soon as the Union ended its threats of fines and discipline, and that the net result was that the Union's overtime ban remained in effect. After some discussion of this issue at a negotiation meeting on January 16, 1979, Western stated that it intended to implement the 37-1/2-hour workweek on January 22, 1979, and Respondent replied that the overtime ban was back on.[7] The record does not indicate whether Western ever actually implemented the 37-1/2-hour workweek or whether Respondent ever actually rescinded its January 3, 1979, notice and informed its members that the overtime ban was back in effect.

The Administrative Law Judge credited the uncontradicted testimony of Phyllis Goodall, a unit employee and Respondent's recording secretary, who was the only witness at the hearing in this case. Goodall testified that about 320 of Respondent's 490 members attended a special union meeting held on August 28 to discuss the proposed overtime ban.[8] She testified that during this meeting the members spoke about the same problems they had been complaining about at work and

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7 The stipulated documents include the minutes of this meeting and of a negotiation meeting on February 16, 1979. The minutes indicate that many other issues were also discussed at these meetings, such as job classification, wage rates, union security, holidays, and several specific fringe benefits.

8 The parties stipulated that there were about 500 employees in the unit.

at previous meetings during July and August, when they had also discussed whether or not they should work overtime. She stated that the members were upset about the way negotiations were being dragged out and about the letters that Western was sending to employees concerning the negotiations.[9] She also stated that employees asked "why we were working the company's overtime when they . . . were doing different things to the members."[10] She testified that there was some mention of imposing fines on anyone who broke the proposed overtime ban, but that there was no discussion of the amount of the fines until a later meeting. At this meeting, the members voted 220 for and 100 against imposing an overtime ban, effective immediately.

Analysis

Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a union to "restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . ." In determining the legality of particular union rules under the proviso to this section, the Supreme Court has historically held that the internal enforcement of a properly adopted union rule against voluntary union members by expulsion or a reasonable fine is permissible, where the rule reflects a legitimate union interest and frustrates no statutory labor policy.[11] In this case, the union rule was properly adopted by a majority vote of the members, there is no showing that membership in the Union

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9 Respondent's first unfair labor practice charge against Western specifically alleged that Western "has mounted a massive communications campaign directly with its employees designed to circumvent the collective-bargaining representative of its employees. . . ."

10 Goodall did not explain what "different things" Western was doing to employees.

11 *Scofield et al.* v. *N.L.R.B.*, 394 U.S. 423, 428-430 (1969).

was involuntary, and the rule was enforced solely through the internal method of union charges and fines collected by threat of judicial action. Therefore, the questions to be answered are whether the rule was invoked to promote a legitimate union interest and whether the rule invades any overriding policy of the labor laws.

It might be argued that the rule involved here was adopted in furtherance of the Union's legitimate interest in functioning as an effective bargaining agent, regardless of whether it was imposed merely as a bargaining tactic designed to put economic pressure on Western during collective bargaining as contended by the General Counsel or whether it was imposed in response to Western's alleged unfair labor practices as contended by Respondent. However, the Supreme Court has indicated that any union rule which frustrates a statutory labor policy goes beyond the legitimate interests of a labor organization.[12] The crucial inquiry is thus whether the Union's overtime ban violated any policy of the Act.

It is well established that a union violates Section 8(b)(1)(A) of the Act if it disciplines members who refuse to engage in unprotected activity which would subject them to lawful discipline by their employer.[13] It is also clear that the repeated refusal of employees to perform mandatory assigned overtime work is unprotected by the Act because it constitutes a recurring or intermittent partial strike.[14] There is no dispute in this case that Respondent, by its promulgation of new "Work Rules" on August 28, announced the intention of its members to engage in such unprotected repeated refusals to work man-

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12 *Id.* at 430; *N.L.R.B.* v. *Industrial Union of Marine & Shipbuilding Workers of America [United States Lines Co.]*, 391 U.S. 418, 424 (1968).

13 *Insurance Workers International Union AFL-CIO, Local 60 (John Hancock Mutual Life Insurance Company)*, 236 NLRB 440 (1978).

14 *John S. Swift Company, Inc.*, 124 NLRB 394 (1959), enfd. 277 F.2d 641 (7th Cir. 1960); *Honolulu Rapid Transit Company, Limited*, 110 NLRB 1806 (1954). See also *First National Bank of Omaha*, 171 NLRB 1145, 1149-51 (1968), enfd. 413 F.2d 921 (8th Cir. 1969); *J. P. Hamer Lumber Company, Division of Gamble Brothers, Inc.*, 241 NLRB No. 100 (1979).

datory overtime if assigned to do so. However, the Administrative Law Judge concluded that the employees' planned refusal to work overtime was protected because it was in response to the unfair labor practices Western had allegedly committed during collective bargaining. We disagree.[15]

We find that the employees voted to impose the overtime ban solely as a bargaining tactic, designed to put economic pressure on Western and to force Western to make bargaining concessions, rather than in response to any perceived unfair labor practices.[16] Accordingly, we regard the cases cited in footnote 14 as controlling and find it unnecessary to pass on the question of whether a different result would obtain had the employees been protesting unfair labor practices committed by their employer. In coming to this conclusion as to the emloyees' motivation, we note that no charges were filed against Western until almost 2 months after the overtime ban was implemented, that there is no evidence of any discussion at the August 28 union meeting characterizing Western's actions as unfair labor practices, that Respondent's notice announcing the overtime ban makes no reference to Western's alleged unfair labor practices, and that the meager evidence as to the

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15 While it is unnecessary to our decision in this case, we note that even under the Administrative Law Judge's own rationale it must be shown that the Employer actually committed unfair labor practices which the employees were protesting. However, there has been no finding either in this case or in any prior Board cases that Western has committed any unfair labor practices. Rather, the Administrative Law Judge relied upon the mere fact that Respondent had filed charges alleging that Western has committed unfair labor practices, which Western later agreed to settle over Respondent's objections. The Administrative Law Judge then precluded Respondent from litigating the merits of its unfair labor practice charges against Western as part of its affirmative defense. This was clearly incorrect.

16 In reaching this conclusion, we particularly rely on the fact that the overtime here in question was mandatory and lawfully imposed. Cf. *Excavation-Construction, Inc.*, 248 NLRB No. 81 (1980); *Gaska Tape, Inc.*, 241 NLRB No. 96 (1979), and Member Jenkins' dissent in *Prince Lithograph Co., Inc.*; 205 NLRB 110 (1973). We do not rely on *Valley City Furniture*, 110 NLRB 1589 (1954), 230 F.2d 947 (6th Cir. 1956), which we consider incorrectly decided. See *Excavation-Construction, supra*, sl. op. at p. 19.

discussion at the August 28 union meeting indicates the employees were mainly concerned with Western's failure to reach an agreement with the Union quickly.

Therefore, we conclude that, notwithstanding the alleged unfair labor practices of Western, Respondent's overtime ban constituted an unprotected partial strike and Respondent violated Section 8(b)(1)(A) by disciplining its members who refused to engage in such unprotected activity.

Conclusions of Law

1. Western Publishing Co., Inc., is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent GAIU Local 13-B, Graphic Arts International Union, is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

3. By enforcing an overtime ban prohibiting its members from performing mandatory assigned overtime work through the imposition of internal union discipline upon Robert Greene, Helen Tabone, Barbara Jones, Helen Lenehan, John Hildebrand, Patricia Porter, Geraldine Aiello, Ardine Hall, Bernard Lewis, Patricia Long, Richard Bennet, Marianne LaForge, JoAnn Balastire, William Rowe, Pearl Ryan, Samuel Cherry, and Bruce Bauer for their refusals to engage in an unprotected recurring and intermittent partial strike, Respondent has violated Section 8(b)(1)(A) of the Act.

4. Respondent's violations of Section 8(b)(1)(A) of the Act are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(b)(1)(A) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the

Act. Specifically, as we have found that Respondent has unlawfully disciplined and fined its members Robert Greene, Helen Tabone, Barbara Jones, Helen Lenehan, John Hildebrand, Patricia Porter, Geraldine Aiello, Ardine Hall, Bernard Lewis, Patricia Long, Richard Bennet, Marianne La Forge, JoAnn Balastire, William Rowe, Pearl Ryan, Samuel Cherry, and Bruce Bauer, we shall order that Respondent rescind the disciplinary action taken against them and that it make them whole for any losses they have suffered as a result of Respondent's unlawful conduct. In particular, we shall order Respondent to refund to them any moneys held or collected on account of the fines assessed against them, with interest thereon to be computed in accordance with *Florida Steel Corporation*, 231 NLRB 651 (1977).[17]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, GAIU Local 13-B, Graphic Arts International Union, Hyde Park, New York, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Charging, trying, fining, prosecuting any lawsuits to collect fines, or otherwise disciplining Robert Greene, Helen Tabone, Barbara Jones, Helen Lenehan, John Hildebrand, Patricia Porter, Geraldine Aiello, Ardine Hall, Bernard Lewis, Patricia Long, Richard Bennet, Marianne LaForge, JoAnne Balastire, William Rowe, Pearl Ryan, Samuel Cherry, and Bruce Bauer, or any of its members, for refusing to engage in an unprotected recurring and intermittent partial strike.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

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17 See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

2. Take the following affirmative action designed to effectuate the purposes of the Act:

(a) Rescind the disciplinary action taken against Robert Greene, Helen Tabone, Barbara Jones, Helen Lenehan, John Hildebrand, Patricia Porter, Geraldine Aiello, Ardine Hale, Bernard Lewis, Patricia Long, Richard Bennet, Marianne LaForge, JoAnn Balastire, William Rowe, Pearl Ryan, Samuel Cherry, and Bruce Bauer for refusing to engage in an unprotected recurring and intermittent partial strike, and expunge from their records any reference to that discipline.

(b) Make Robert Greene, Helen Tabone, Barbara Jones, Helen Lenehan, John Hildebrand, Patricia Porter, Geraldine Aiello, Ardine Hale, Bernard Lewis, Patricia Long, Richard Bennet, Marianne LaForge, JoAnn Balastire, William Rowe, Pearl Ryan, Samuel Cherry, and Bruce Bauer whole for any losses they have suffered as a result of the unlawful conduct, in the manner set forth in "The Remedy" section of this Decision.

(c) Post at its offices and meeting halls copies of the attached notice marked "Appendix."[18] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Sign and return to the Regional Director for Region 3 sufficient copies of the attached notice marked "Appendix" for posting by Western Publishing Co., Inc., if willing, in

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18 In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

conspicuous places, including all places where notices to employees are customarily posted.

(e) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. September 30, 1980

/S/ JOHN H. FANNING
John H. Fanning, Chairman

/S/ HOWARD JENKINS, JR.
Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

MEMBER PENELLO, concurring:

I agree with my colleagues that Respondent violated Section 8(b)(1)(A) by disciplining its members who refused to engage in an unprotected partial strike; however, in reaching this result, I find it unnecessary to disturb the Administrative Law Judge's conclusion that the employees were protesting Western's allegedly illegal conduct. For, even assuming that the overtime ban was instituted in response to actual unfair labor practices committed by Western, I would conclude that such conduct by Western would not privilege the employees to engage in what would otherwise be a clearly unprotected partial strike.

In this regard, I rely on *Valley City Furniture Company*.[19] There, the respondent employer refused to provide the union with wage information, unilaterally increased employee working hours from 8 to 9 hours per day, and gave its negotiators only limited authority. The union held a meeting at which the employees decided:

19 110 NLRB 1589 (1954), enfd. 230 F.2d 947 (6th Cir. 1956).

> to cut out overtime *until and unless* the Company would meet with [the Union] and bargain in good faith . . . [and] . . . to cut out overtime beginning on the following day; that is . . . to cease work at 3:30 instead of 4:30 [p.m.], the 3:30 period being the end of the eight hour day.

The next day, the respondent was informed of the union's decision, and at 3:30 p.m. a number of employees walked off the job.

Although the Board held that the respondent violated Section 8(a)(5) by the acts described above, it found that inasmuch as the employees had refused to work the overtime hours set by the respondent and had intended to continue such tactics, their conduct constituted an unprotected partial strike. The Board further held that the unprotected nature of this activity was not changed by the fact that the respondent had committed unfair labor practices, stating:[20]

> We find that the partial strike called by the Union from its very inception was the sort of activity which, although concerted, is not, as against the action taken by the Respondent, entitled to the protection of the Act. The vice in such a strike derives from two sources. First, the Union sought to bring about a condition that would be neither strike nor work. And, second, in doing so, the Union in effect was attempting to dictate the terms and conditions of employment. Were we to countenance such a strike, we would be allowing a union to do what we would not allow any employer to do, that is to unilaterally determine conditions of employment. Such a result would be foreign to the policy objectives of the Act. It is true, as our dissenting colleagues state, that the Respondent unilaterally changed the hours of work. But that unlawful act did not privilege the Union's resort to the partial strike as a self-help device, any more than the Union would have

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20 *Id.* at 1594-95.

been privileged to engage in a sitdown strike or slowdown to protest the Respondent's action.[14]

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14 We find no merit in the General Counsel's argument that a partial strike, otherwise unprotected, would gain the protection of the Act by reason of its having stemmed from the Respondent's unfair labor practices. We regard the case cited by the General Counsel (*Mastro Plastics Corp.*, 103 NLRB 511) as inapposite.

In the instant case, the Administrative Law Judge found that Respondent instituted a ban on overtime as a reaction to and in protest of Western's allegedly unlawful refusal to bargain in good faith and its allegedly unlawful written communications to employees. However, even assuming that such conduct was in fact violative of Section 8(a)(5), I conclude that under the teachings of *Valley City* those "unlawful act[s] did not privilege the Union's resort to the partial strike."[21]

I recognize that the Board has found that where an employer has, in violation of Section 8(a)(5), unilaterally instituted changes in the hours of work, employee refusals to comply therewith are protected and do not constitute a partial strike.[22] But in those cases the employees' conduct consisted of nothing more than noncompliance with an unlawfully instituted rule and there was no indication that the employees intended to engage in a partial work stoppage to compel their employer to take some action. In contrast, in *Valley City*, as indicated above, the employees were not solely protesting the respondent's unilateral increase in working hours, but were also protesting its refusal to meet with the union and bargain in good faith. Significantly, the refusal to work overtime was the method chosen by the employees to compel the respondent to change its bargaining tactics. Thus, unlike the situation in the cases described above, the employees in *Valley City* were not merely refusing to comply with an unlawfully instituted rule.

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21 *Id.* at 1595.

22 *Gaska Tape, Inc.*, 241 NLRB No. 96 (1979); *Anderson Plumbing and Heating Company*, 203 NLRB 18 (1973).

Similarly, in the instant case, even accepting the Administrative Law Judge's characterization of the employees' motivation, i.e., that they were reacting to alleged unfair labor practices committed by Western, it is clear to me that they, like the employees in *Valley City*, were attempting to compel their employer to change its bargaining tactics. In my view, it is obvious that this is not a case where employees were merely refusing to comply with unilaterally instituted changes made by their employer with regard to working hours, because no such changes had in fact occurred at the time the overtime ban was instituted.

Finally, I disagree with the Administrative Law Judge's reliance on the cases cited in support of his conclusion that the employees' partial strike was protected.[23] I specifically take exception to the Administrative Law Judge's statement that

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23 I did not participate in *Blades Manufacturing Corporation*, 144 NLRB 561, 564-567 (1973), enforcement denied 433 F.2d 998 (8th Cir. 1965), or in *Schneider Mills, Inc.*, 164 NLRB 879, 884, fn. 17 (1967), and I regard those cases as of doubtful precedential value inasmuch as they did not discuss the application of *Valley City, supra*. Furthermore, I find *Blades* to be distinguishable since the concerted activities there were treated as a series of single concerted refusals to work, each in protest of a separate unlawful act by the employer, rather than as recurring and intermittent partial strikes. In *Schneider Mills*, the Administrative Law Judge found certain partial strike activity to be protected as a response to employer unfair labor practices, but the Board added its own rationale for finding the violations in issue and did not adopt the Administrative Law Judge's reasoning on that point. To the extent that *Blades* and *Schneider Mills* can be read as being inconsistent with *Valley City*, I would not follow them.

The Administrative Law Judge also cited *N.L.R.B.* v. *Thayer Company*, 213 F.2d 748 (1st Cir. 1954), cert. denied 348 U.S. 883 (1955), which holds that where collective action is precipitated by an employer's unfair labor practice, a finding that the employees' conduct is not protected under Sec. 7 does not, *ipso facto*, preclude the Board from ordering the employer to reinstate the employees if such an order would effectuate the purposes of the Act. However, I conclude that while it may effectuate the purposes of the Act to require the employer to correct its own unfair labor practice by reinstating employees who were discharged for engaging in some less egregious form of unprotected activity, this balancing of interests does not mean that the union can then lawfully discipline its members for refusing to engage in such unprotected activity.

Mastro Plastics Corp. v. *N.L.R.B.*, 350 U.S. 270 (1956), stands for the general proposition that "when employees engage in a strike action in response to employer unfair labor practices, they are treated differently from employees who act solely by furtherance of economic demands." In *Arlan's Department Store of Michigan Inc.*, 133 NLRB 802 (1961),[24] the Board eschewed a broad interpretation of *Mastro Plastics*. The Board reasoned that the language used by the Court and its rationale could not be divorced from the facts of the case and the argument presented by the parties. The Board held in *Arlan's* that employees are privileged to engage in a strike in violation of a no-strike clause in their collective-bargaining agreement, which would otherwise by unprotected, only where they are protesting "flagrant" or "serious" unfair labor practices by their employer. The Board indicated that where the employer is engaging in conduct attacking the very existence of the collective-bargaining representative it is materially breaching its obligations under the contract and therefore the union should be excused from performance of the no-strike clause. In the absence of such a clause, a total strike is, of course, a protected concerted activity. However, the same cannot be said of the conduct in issue here, for repeated refusals to work mandatory overtime constitute unprotected activity even in the absence of a no-strike provision. Therefore, this is not a situation where the unfair labor practices of an employer can be viewed as eliminating the only circumstance which renders the employees' activity unprotected. Accordingly, in my view, the *Mastro Plastics* line of case law does not support the result reached by the Administrative Law Judge.

Dated, Washington, D.C. September 30, 1980

/S/ JOHN A. PENELLO
John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

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24 *Arlan's* was recently reaffirmed by the Board in *The Dow Chemical Company*, 244 NLRB No. 129 (1979).

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT charge, try, fine, prosecute any lawsuits to collect fines, or otherwise discipline Robert Greene, Helen Tabone, Barbara Jones, Helen Lenehan, John Hildebrand, Patricia Porter, Geraldine Aiello, Ardine Hall, Bernard Lewis, Patricia Long, Richard Bennet, Marianne LaForge, JoAnn Balastire, William Rowe, Pearl Ryan, Samuel Cherry, and Bruce Bauer, or any of our members, for refusing to engage in an unprotected recurring and intermittent partial strike.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the disciplinary action taken against Robert Greene, Helen Tabone, Barbara Jones, Helen Lenehan, John Hildebrand, Patricia Porter, Geraldine Aiello, Ardine Hall, Bernard Lewis, Patricia Long, Richard Bennet, Marianne LaForge, JoAnn Balastire, William Rowe, Pearl Ryan, Samuel Cherry, and Bruce Bauer for refusing to engage in an unprotected recurring and intermittent partial strike, and WE WILL expunge from their records any reference to that discipline.

WE WILL make Robert Greene, Helen Tabone, Barbara Jones, Helen Lenehan, John Hildebrand, Patricia Porter, Geraldine Aiello, Ardine Hall, Bernard Lewis, Patricia Long, Richard Bennet, Marianne LaForge, JoAnn Balastire, William Rowe, Pearl Ryan, Samuel Cherry, and Bruce Bauer whole for any losses they have suffered as a result of our unlawful conduct. In particular, WE WILL refund to them any moneys held or collected on account of the fines assessed against them in connection with the aforesaid disciplinary action, with interest.

GAIU LOCAL 13-B, GRAPHIC ARTS INTERNATIONAL UNION

_____
(Labor Organization)

Dated _____ By _____
(Title) (Representative)

This is an official notice and must not be defaced by anyone. This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 3614, 26 Federal Plaza, New York, New York 10007, Telephone 716-846-4951.

APPENDIX D

29 U.S.C. § 141

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) * * *

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

29 U.S.C. § 142

When used in this chapter—

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees.

29 U.S.C. § 151

* * *

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the

practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 401

(a) The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection; that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Nation; and that in order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.

* * *

(c) The Congress, therefore, further finds and declares that the enactment of this chapter is necessary to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act, 1947, as amended, and the Railway Labor Act, as amended, and have the tendency or necessary effect of burdening or obstructing commerce by (1) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (2) occurring in the current of commerce; (3) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods into or from the channels of commerce, or the prices of such materials or goods in commerce; or (4) causing diminution of employ-

ment and wages in such volume as substantially to impair or disrupt the market for goods flowing into or from the channels of commerce.

29 U.S.C. 411

(a)(2) Freedom of speech and assembly.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

29 U.S.C. § 529

It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter. The provisions of section 412 of this title shall be applicable in the enforcement of this section.